

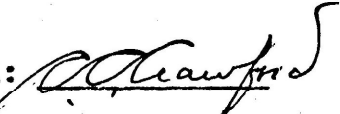
BILLS OF ATTAINDER

by

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## BILLS OF ATTAINDER.

Bills of attainder are acts of the supreme legislative power, which inflict capital punishment without any conviction in the regular course of judicial proceedings. The legislative authority of the state assumes judicial magistracy without judicial trial, and if the accused is declared guilty, passes sentence of death. (1) When the act inflicts punishment less than death, it is known as a bill of pains and penalties. (2)

The proceedings in bills of attainder in England did not vary from that adopted in other forms of legislation. Although they might have been introduced in either house, they were usually commenced in the house of Lords; they passed through the same stages, and after being approved by a majority vote of both houses, they received the royal assent. Theoretically the parties who were subjected to these proceedings were allowed to defend themselves by counsel and witnesses before both houses. (3) However, defense and

(1) Some excellent definitions have been given by American judges in cases at law; See *Ex parte Law*, 35 Georgia, 285-298; *Cummings v. Missouri*, 4 wall. (U.S.) 277; *Doe v. Burford*, 1 Dana (Kentucky), 481-509. See also Story, *On the Constitution*, s. 1344. The accepted definition in the United States is:- "A legislative act which inflicts punishment without a judicial trial". *Cyclopedia of Law and Procedure*, v. 706.

(2) *Cyclopedia of Law and Procedure*, v. 706. No true case of attainder has ever arisen under our constitution, each test actually coming under pains and penalties, where punishment was less than death.

(3) May, *Parliamentary Practice* (1883), 744. For distinction between bills of attainder and impeachment see Taswell-Langmaed, *Constitutional History of England* (5th Ed.) 323-327.



hearing in Parliament before the passage of such bills was the exception rather than the rule.

In view of the fact that English common law afforded the accused certain privileges and safeguards of justice in the regular courts, such as speedy trial, protecting rules of evidence, unanimous verdict, and appeal, parliament made no pretence that it was following common law procedure. It made its own rules, limiting or dispensing with trial and evidence as it saw fit. It decided both fact and law, and its verdict was a legislative act. No uniformity of proceedings was observed, and nothing which justified the name of judicial investigation. Usually the offense was ex post facto.

The consequences of bills of attainder were; loss of life, forfeiture to the state of all property, real or personal, dating back to the time of the guilty act, and corruption of blood. The deed for which such bills were passed might be either political or criminal; although the offense was assumed worthy of extraordinary procedure, and when parliament thus acted it was also assumed that there was some connection between the offence and the state.(4)

Today, the practice of passing bills of

(4) Certain peers dissented from the bill of attainder against Sir John Fenwick because he was so "inconsiderable a man to endanger the peace, so that there is no need for this extraordinary manner. "Dartmouth and Elliot Hodgkin MSS. (Hist. MSS. Comm., Report xiv, part 1 and 11), 337.

Attainder has become obsolete. For more than a century and a half, no act of its kind has been considered by the British parliament. These acts have been abandoned, it seems, because of hostile public opinion and an awakening to the higher feeling of justice in men, which has made them sensitive regarding such arbitrary forms. The history of this legislation, however, reveals the all prevailing power of parliament, and the relation between the legislative and judicial departments in England. The subject has never been adequately treated by writers on English Constitutional History, or English Common Law.

In this paper I shall undertake to trace the history of bills of attainder in England. The historical background is necessary to show the conditions and circumstances under which such acts were passed. No attempt will be made to justify or condemn the principles involved, but it will be found that nearly all bills of attainder are the results of public excitement and personal bitterness occasioned by civil wars and domestic disturbances, when the keener sense of justice was blunted. Special attention will be given to the acts passed against the earl of Strafford and Sir John Fenwick, because these two trials are the best known instances of bills of attainder and at the same time bring out clearly the method and theory used by parliament in passing such bills.

The history of bills of attainder opens in the fifteenth century,-- a time filled with the recurring struggles between the alternately ruling and warring houses of York and Lancaster. King Henry VI's nearest kinsman was Richard, duke of York,-- a powerful noble and a descendant of Edward III with a better hereditary title to the throne than the king himself. (5) During Henry's attacks of insanity the duke of York had been Lord Protector, but the recovery of the ruler had twice cost the duke his position. (6)

In 1459 the spirit of discontent against the government was more manifest, and early in the fall, Richard of York, the earl of Salisbury, and the earl of Warwick, 'the king maker', armed their followers and proceeded ostensibly to lay their purposes before the king. Henry VI's army hastened to meet this force. Salisbury's following did engage a part of the royal army at Blowheath in Staffordshire and defeated them. But between the united forces no battle occurred, for desertion so weakened the Yorkists that on October 13th the disheartened leaders and their followers fled. (7).

(5) Dictionary of National Biography, XLVIII. 176.

(6) Hunt and Poole, The Political History of England, IV. 361.

(7) Hunt and Poole, The Pol. Hist. of Eng., IV. 380-385.

Taswell-Langmaed in his Constitutional History of England is in error when he says that the first bill of pains and penalties was passed in 1320 against the two Despensers. The bill passed, is given in 1 How. St. Tr., 27. The enacting clause is 'wherefore we peers of the land, earls and parons, in the presence of our lord, the king do award...' This act was not passed by parliament, rather by the peers of England. It was not assented to separately by the king.

On his return to Coventry Henry summoned his parliament to meet on the 20th of November. All of the lords who attended were staunch friends to the house of Lancaster, so that the first act of the Coventry Parliament was to pass a bill of attainder against Richard, duke of York, and others who were accomplices in the rebellion. If after the first clash of arms any hope for peace remained, it was lost by this sweeping attainder of the king's enemies at Coventry. (8)

The bill began by reciting the favors and honors which the king had bestowed upon the duke of York, It recorded York's previous lapses from loyalty:- the confederation with Jack Cade (9), and his alliance with the Earls of Salisbury and Warwick,- each of which was followed by a pardon from Henry VI and restoration to favor. There was also an account of the battle of Blowneath, and the final flight from Ludlow. "Wherefore pleased it his highness, these premises considered, by the advice and assent of the lords Spiritual and Temporal, and of the Commons" to attain the participants in the rebellion. (10)

There were three lists of names in the instrument:- Richard earl of Salisbury, and eight others for

(8) Parliamentary History, I. 401.

(9) Hunt and Poole, Hist. of Eng., IV. 347-351.

(10) For the bill of attainder passed by Coventry Parliament (1459) see Rotuli Parliamentorum, V. 347-351. There is a summary of the bill in Parl. Hist., I. 401-403.

their specific act of rebellion at Blowheath; Richard, duke of York, the Earls of March, Warwick, Salisbury, and Ruthland, and twelve others for their traitorous conduct at Ludlow; and Alice, wife of the Earl of Salisbury, and four others for procuring and aiding treason against the realm. The bill declared forfeited all the goods, chattels, estates, honors, and dignities of the attainted persons and their heirs. (11)

There is no evidence to show that any of these persons were executed under the attainnt, but the forfeiture and corruption of blood was enforced during the last year of Henry's reign. (1460-1461) where was no judicial proceedings in parliament before the passage of the bill; no witnesses were examined. The purpose of the act was to cast public odium upon the rebels and to confiscate all of their property to the crown.

The political act against the duke of York and his followers is the precedent for all subsequent bills of attainder. Attainder then, as this history shows, had it's beginning in a century of recurring civil war; its course, its form, and the arbitrary contex,- all were the product of the time. Yet the proceedure was established and used in the main, until the middle of the eighteenth century, when the practice was abandoned because of hostile public opinion.

(11) "All and singular hereditaments of the said duke and others attainted, in fee or fee-tail, were adjudged to be forfeited to the crown; and their heirs disinherited to the ninth generation." Parl. Hist., I. 403.

After 1459 every political triumph until the reign of Henry VIII was followed by a bill of attainder. Edward IV succeeded Henry VI, after defeating and scattering the armies of the house of Lancaster. Edward's first parliament in 1461 at once declared Henry VI a usurper, and then turned to the passage of a bill of attainder.(12) The Yorkist nobles in the house of Lords took pains that none of the enemies of the king were omitted, for their bill attainted more persons than any other such act passed in English history.

The instrument contained 133 names, headed by the deposed king, Henry VI. Queen Margaret; Edward, prince of Wales; the Duke of Somerset; and the earl of Northumberland were included in the list of attainted. Fourteen peers and over a hundred knights, squires, household retainers, bishops, and friars were named in this bill. The crimes alleged in the act were; the murder of the Duke of York in battle, rebellion at the battles in Saxton, and Towlin Field, the delivery of the towns of Carlisle and Berwick to the Scots, procuring foreign princes to invade the realm, and specific campaigns against the king in the summer and at Tubal.(13) Parliament completed its labors by reversing the Coventry attainders.

(12) Hunt and Poole, Hist. of Eng. IV. 410; Parl. Hist., I. 419-420.

(13) For the bill of attainder passed in 1461 see Rot. Parl., V. 478-478; There is a summary of the act in Parl. Hist., I. 421.

In 1475 a bill was passed against other persons who had been active in small uprisings against the government since the meeting of the king's first parliament, and Richard and Robert Welles, Thomas Delelaunde, and three others were punished by bill for their treasonable rebellion at Empingham on the field of Hornefeld.(14)

The attainder of George, duke of Clarence in 1478 is of especial importance because for the first time parliament heard the evidence against the accused. There was only a quarrel against the Duke of Clarence and his brother Edward IV, over summary punishment of one of Clarence's retainers,(15) but the angry dispute cost the duke his life. Undoubtedly the king forced the attainder of the duke. He accused Clarence with his own mouth(16), and at the hearing in the house of Lords, Edward from the platform above railed down at his brother. "No one charged the duke but the king, nor no one answered the king but the duke".(17) His guilt was very doubtful. His sole offense, it would seem, was that he incurred the disfavor of the sovereign. Clarence denied all, and offered to defend his cause by combat.(18) But the House of Lords

(14)- Parl. Hist., I. 432. For the bill of attainder in 1475 see Rot. Parl., VI. 144-145.

(15) 1 Howell, State Trials, 275; Parl. Hist., I. 435.

(16) Parl. Hist., I. 435.

(17) Parl. Hist., I. 436.

(18) Parl. Hist., I. 436. "Some persons were produced whom it was much doubted whether they came as accusers of the Duke, or evidence for him". 1 How. St. Tr. 435.

announced their satisfaction at the evidence, so the speaker and the members of the house of Commons were called before the upper house and a rehearsing of the whole matter was made. Then the bill was passed, and after the assent of the king the Duke of Clarence was executed. (19)

The bills of attainder passed before the bills of attainder passed before the act against Clarence had punished persons at civil war with the king, who were not likely to appear in the royal courts of common law for trial. The bills took the place of outlawry, and had only caused the confiscation of the rebel's property for the state. But Clarence was confined in the tower; was attainted by parliament; and was beheaded as an enemy of the state, for the king and state were one.

Richard III called one parliament, which met at Westminster in 1484. It was composed of men entirely subservient to the king. One great bill of attainder and a number of smaller ones seems to have been the chief work of the men called. The first instrument of attainder was directed against Henry, late Duke of Buckingham (20), the

(19) For the bill of attainder passed in 1478 see Rot. Parl., VI. 193-195. "Said duke falsely and traitorously intended and purposed firmly the extreme destruction and disinheritance of the king and his heirs."

(20) Rot. Parl., VI. p. cv. in Appendix; Parliamentary History, I. 443, recites (quoting from the History of Croylando) "for so many great men and peers and commoners, were proscribed," he means attainted, "as was never known since the time of the triumvirate of Octavius, Anthony, and Lepidus."



Earls of Richmond and Pembroke, and 91 others, all leaders in opposition and rebellion to the house of Lancaster. Their estates were forfeited to the king, and those who were concerned in the conspiracies of Richmond or Buckingham were deemed rebels and traitors (21). In separate bills, for the levying of war and the harboring of traitors, Walter Roberd was also attainted by this parliament(22); and the Bishops of Ely, Sarum, and Exeter were condemned by another act for treason. (23)

The War of the Roses came to an end with the accession of the Lancastrian Henry VII and his marriage to Elizabeth of York, who represented the other line of claimants. The precedent of punishing the late enemies was still strong, so that Henry's first parliament in 1486 prepared and passed a bill attainting the late king Richard III, the Earl of Surrey, and some twenty-eight others "for perjury, treason, homicide, and shedding infants' blood." (24)

Fresh opposition to the sovereign came in 1489, with the insurrection led by Robert Lincoln. After the battles of Pleynefield in 1496, and Blackheath in Greenwich,

(21) Rot. Parl. VI. 246; Parliamentary Hist. I. 445.

A bill of pains and penalties was passed against Margaret countess of Richmond, mother to the king's great rebel and traitor Henry, earl of Richmond, in 1483. She was punished by being disabled from holding or enjoying any land tenement, or estate in the realm. Rot. Parl., IV. 250 Dict. Natl. Biog., IV. 48.

(22) Rot. Parl., V, 250-251; Parl. Hist., I. 447.

(23) Parl. Hist., I. 447.

(24) Rot. Parl., VI. 271; Parl. Hist., I. 445.

the leaders of the Lincoln conspiracy were put in complete rout, and domestic rebellion was ended for the remaining years of king Henry VII. Bills of attainder were passed by parliament after each defeat administered by the royal army. (25)

There is one exceptional bill of attainder in Henry VII's reign. In 1489 John Spinnall and eighty others were attainted for participating in a riot in London. There was no statute making riots treasonable, and parliament as usual made no pretense of trial. (26)

Henry VIII, in his accession to the throne, united the rival claims of the houses of York and Lancaster. His title rested upon an act of parliament passed early in his father's reign, declaring Henry VII lawful king of England and entailed the throne upon the heirs of his body lawfully begotten. Henry VIII's position therefore was independent and powerful. Any dispute over succession

(25) Lincoln's bill of attainder punishes 28 persons, - see Rot. Parl., VI. 397: John, Abbot of Abington and three others were attainted in a later bill for complicity in the insurrection, - see Rot. Parl., VI. 436-437. For the Pleynefield attainder see Parl. Hist. I. 437; for the bill see Rot. Parl., VI. 504. Twenty-three were attainted by the act. For the Blackheath attainder see Rot. Parl., VI. 544-545; Audely and fifty-two others were listed in the attainder. Other attainders of this reign were:- John Hayne, 7 Hen. 7th; Parl. Hist., I. 472. Robert Chamberlain and two others 7 Hen. 7th; Parl. Hist., I. 473.

(26) House of Lords MSS., 1695-7 (Hist. MSS. Comm.,) II 274-301.

seemed settled. The bloody wars of the Roses had practically destroyed the Norman nobility whose policy since the Norman conquest had been opposition to the crown. Henry created a new nobility which was dependent upon the Tudors for their titles and position. The House of Commons was composed of merchants and country gentlemen who favored the Tudor policy, and above all any measures necessary to preserve peace in the realm. As Miss Temperley in her life of Henry VIII well says:- "Parliamentary government had been a lamentable failure, and the people, who had proved themselves unripe for power, were ready to sacrifice the theory of freedom for the fact of peace." (27) Parliament naturally inclined to respect the king's wishes.

In order to content the commonality, "which seemed to be wholly altered by the rigorous proceedings of Henry VII". (28) Henry's second parliament in 1511 proceeded to attain two of his father's chief ministers,-- Thomas Empson and Edmund Dudley who were very unpopular because of their rigorous practices. Although there was no opposition in parliament, since the men were already convicted by royal courts of treason, the king hesitated until the next year before permitting their execution. These men had served his father faithfully, and Henry it would seem disliked to sacrifice them to satisfy the people. (29)

(27) Gladys Temperley, Henry VIII, 242.

(28) Parl. Hist., I. 473.

(29) Parl. Hist., I. 472-473.

In the trial of Edward Stafford, Duke of Buckingham, as in all great state trials, consistency of justice was subservient to the real or supposed dictates of political expediency. Buckingham was a descendant of Thomas of Woodstock, the youngest son of Edward III. He believed that he had a claim to the crown in case Henry VIII died without male issue, and his public assertions to this claim made a treason trial inevitable. In 1522, he was indicted, and then tried by a commission of his peers from the House of Lords for high treason. The charges were that he had asserted his claim to the crown, and was conspiring to become king. Buckingham was declared guilty and beheaded in 1522. (30) In 1523, parliament proceeded to confirm the verdict of guilty and to pass a bill of attainder against Buckingham. (31) The reasons for the bill of attainder were, perhaps, that the two houses might have a share of the odium of his death with the king, and in order to make vacant forever the hereditary office of Lord High Constable which Buckingham held. (32)

(30) 1 How. St. Tr. 289-296; "Edward, late Duke of Buckingham, late of Thornbury, in the county of Gloucester, on the 24th day of April of the 14th year of Henry VIII, committed treason, and was indicted and afterwards by the verdict of his peers after the due order of the Law and the Custom of England attainted of High Treason, as the records more plainly appeareth". Rot. Parl., VI. Appendix CV.

(31) For the whole bill of attainder passed in 1523 see Rot. Parl., VI. Appendix CV.

(32) Gneist, History of the English Constitution, II. 179.

Richard Rouse, alias Cooke, suffered death by boiling under attainder by parliament in 1531. The act professed to attaint him of high treason in order to make an awful example of his crime of poisoning several members of the Bishop of Rochester's family. The unusual clause in the act declared that thereafter murder by poison should be deemed, and adjudged in the law to be high treason.(33) There was adequate punishment for this crime at common law. In no instance had the simple murder of several members of a bishop's household been considered of sufficient importance to merit attainder by parliament; and previously the mere offence of poisoning had never been considered treasonable. The act of parliament was ex post facto; it made Rouse guilty of treason, a law which was not declared until after the commission of the crime. In this act the king and parliament placed their sovereignty above common law, and punished in this bill of attainder simultaneously with the making of new law.

Elizabeth Barton was a simple servant girl in the family of Thomas Cobb, who lived twelve miles from Canterbury. After a serious illness in 1528, she began to have visions and to relate strange tales concerning her communication with angels and devils. The people of her

(33) 3 How. St. Tr., 1511; 22 Hen. VIII c. 9; House Journal, VII. 126; House of Lords MSS. (Hist. MSS), IV. 126.

community became convinced that she had divine insight. Her fame became spread over the country, and the 'holy maid of Kent' was visited by all classes and kinds of people for advice. The seeress took the veil, and received recognition from the church of her divine insight. But the 'nun of Kent' was drawn into politics by scheming nobles who wanted deliverance from their allegiance to king Henry upon the sovereign's remarriage, and condemnation of the ruler for heresy and schism. She was induced to announce 'that God was highly displeased with the king for his divorce from Catherine, and that in case he ventured to marry again, Henry would not continue ruler another month.(34)

By July 1533, the government decided to act; they arrested Elizabeth Barton and examined her before the Privy Council. An admission of deceit was obtained from

(34) Hunt and Poole, Hist. of Eng., V. 531-535; 3 How. St. Tr. 1511; House of Lords Journal, VII. 126.

(35) The facts of the attainder of Thomas More, once Lord Chancellor of England are not clearly established. Hall tells us that More and Bishop Fisher were brought into the Elizabeth Barton bill for misprison of Treason in refusing the oath of supremacy, and that the bill was passed. 2 How. St. Tr. 385. Roper in his life of More denies that the bill was passed. While of little importance to this paper, for there were no new principles involved in this case, there is the title to a bill of attainder in the Rot. Parl., VI. Appendix CCXLIII which reads:- "An act concerning the attainder of Sir Thomas More, Knight". and written below it "Le Roy le vout." (that is 'the king wills it')

An act of attainder was also passed in 1535 against the Bishop of Rochester and others. Title given in Rot. Parl., VI. Appendix CCXLIII.

her. On February 21st 1534, a bill of attainder was introduced in parliament against the 'Nun of Kent'. No evidence was heard by either house except the account of her hearing before the Privy Council, and her confession of deceit, but on March 12 the bill of attainder was passed and Elizabeth Barton condemned for her fanatical prophecies. (36) Her utterances did not come within the treason statute of Edward III, but parliament and the king made attainder a precedent to itself by condemning this simple maid to death. (37)

For some time previous to 1529 there had been a rebellion and conspiracy in the northern part of England headed by the Marquis of Exeter and Lord Montague. The ring leaders had already been found guilty of treason in the royal courts, so that the bill of attainder introduced in parliament was mere formality and was concluded without opposition. The act confirmed the judgment of the court and forfeited the property of the traitors to the state. (38) The Marchioness of Exeter and the Countess of Salisbury had not been convicted in the common law courts, but they were condemned in this bill of attainder without any evidence or hearing in parliament. Their punishment, however, was imprisonment. (39)

(36) Hunt and Poole, Hist. of Eng., V. 334-335. 3 How. St. Tr. 1511.

(37) Froude, History of England.

(38) Froude, History of England.

(39) The act against the Marchioness of Exeter and the Countess of Salisbury was a bill of pains and penalties. House of Lords MSS. (Hist. MSS) 1699-1702. Iv. 418; Parl. Hist., I. 536.

King Henry VIII, himself, must have doubted the legality of the attainder without the presence of the accused, for he asked the chief justice through Thomas Cromwell, one of the secretaries of state, "Whether a man that was forth coming might be attainted of high treason by parliament, and never called to answer." (40. The question seems ironical since not one of the previously attainted persons in his reign had been heard in defense. The Chief Justice submitted the query to the other judges of the Kings Bench. These judges evaded the point in their reply, by reminding the king that the high court of Parliament ought to give example to the lower courts for just procedure; that they thought parliament would never do it, and the inferior courts could not. (41) The king pressed them for a direct, - or should we say favorable- answer, and the court replied that attainder by parliament could not be called into question afterwards, whether or not the attainted was called to answer. (42) Here the judges tacitly admitted the supremacy of the court of parliament over common law.- a fact which in practice had been prevalent since the early bills of attainder.

It was Cromwell who pushed the attainder against the four priests and Margaret Tynell in June 1540.

(40) Coke, Institutes, IV. 37.

(41) Coke, Institutes, IV. 37-38.

(42) Coke, Institutes, IV. 37.



Henry's act of Supremacy in 1534, and other statutes of the 'Reformation Parliament' had made the church in England a department of state so that heresy, adherence to the Pope, or refusal to acknowledge Henry VIII as head of the church were now crimes against the state and were treasonable. Abel. Fetherstone, and Powell were priests in the household of Queen Catherine. Cook had been implicated in a plot against the life of the king, and Margaret Tyrnell had refused to acknowledge Edward Prince of Wales, as heir to the crown. They were all declared guilty of high treason without trial, and executed under a bill of attainder.(43)

An intense hatred by parliament combined with the desire of Henry VIII for a divorce from Anne of Cleves caused the downfall of Thomas Cromwell, earl of Essex and chief minister of the king. The chancellor of the exchequer and one of the principal secretaries of state was universally hated in the realm because of his low birth- (he was a blacksmith's son); for his church policy, his drastic measures, and because of his arbitrary conduct towards the nobles themselves. Cromwell had fostered and arranged Henry's marriage with Anne of Cleves, who was a woman of very little beauty or personal charms, and Henry by 1540 desired a divorce. Life with the queen was not attractive, besides he needed a male heir. The Earl of

(43) 32 Hen., VIII. c. 57; Froude, Hist., of Eng., III. 442.

Essex could not consistently assist in the divorce, and his death would raise the king's favor in parliament.(44)

On June tenth 1540, Cromwell was arrested by the Duke of Norfolk for high treason, at the instance of the king. The original intention was to try Cromwell by impeachment for his crimes(45), but attainder was easire, swifter, and more certain, and by now the most favored weapon to destroy the opponents of the supreme authority. he was condemned unheard without even an answer to the charges alleged. The act was purely personal and political; like the Duke of Clarence, Cromwell's greatest crime was the disfavor of the king. The bill of attainder was proclaimed as law on June 29, 1640, and the King's minister suffered death at the block.(46)

The act charged Cromwell with usurpation of power in that he had set persons at liberty without the king's permission, had granted licenses for monopolies, and had issued commissions in his own name, and by his own authority; with heresy,-he had ordered suspected heretics to be released from prison, had allowed false preachers to be licensed, and had trheatened to maintain certain

(44) Hunt and Poole, Hist. of Eng.,

(45) "He is committed to the tower of London, there to remain till it shall please his magesty to have him tried according to the order of his laws". State Papers, VIII. 350.

(46) Parl. Hist., I. 545: i How. St. Tr. 436.

heresies by force; and finally with bribery and extortion. (47)

It was treason for the wife of the king to be unlawful, and Queen Catherine Howard was punished for this offense. The bill was introduced in the House of Lords on the 21st of January 1542, (48) providing for the attainder of Catherine Howard, late queen of England, and Jane, lady rochford, for treason; Agnes Howard, duchess of Norfolk, and William Howard for misprison of treason. Thomas Culpepper and Francis Dreham received punishment of pains and penalties in the same act. (49) The Duke of Suffolk made declarations of a confession from the queen to him, first in the House of Lords, and after their assent to the bill, he repeated the declaration by request to the House of Commons. The lower house passed the bill on the 9th of February, and the king approved of it by signature on February 11. Two days later Catherine Howard and Lady Rochford were beheaded. (50)

An account of attainder in Henry's reign would not be complete if some mention was not made of the numerous

(47) For the bill of attainder in 1540 see 1 How. St. Tr., 433. Cromwell was accused by several of having said, that if the king and all his realm would turn and vary from his opinion, he would fight in the field in his own person with the sword in his own hand against the king and all others; and if he had a year or two, it would not lie in the king's power to let it if he would. Froude Hist. of Eng., III. 451; State Papers, VIII. 349.

(48) Lords' Journal, (1509-1570) 169.

(49) House of Lords MSS. (Hist. MSS.), 1695-1697 II. 301; Froude Hist. of Eng. IV. 137; Parl. Hist., I. 551.

(50) Parl. Hist., I. 550-552.

bills passed for heresy, non-conformity, and minor rebellions. While, in the main, there is no especial importance attached to the majority of the acts as precedents for law on bills of attainder, yet the acts show the frequency with which this favorite weapon was wielded, and the great number of persons that suffered punishment by parliamentary action.

It has already been noted that the church of England was made into a department of state by the acts of the Reformation Parliament of 1529-36. The church was separated from the Papal See, and the king of England made its head. Refusing the oath of supremacy, nonconformity, adhering to the pope were all made offences against the state. Cardinal Pole; the abbots of Reading, Glasenby, and Colerten were attainted (1540) for heretical doctrines.

(51) Richard Wetherstone, Thomas Abell, Edward Powell, and a yeoman were punished by bill for 'denying the king's supremacy, and adhering to the bishop of Rome; the wife of Tyrell was included in the same bill. She was charged with denying the succession of the Prince of Wales. (1540)

(52) Two gentlemen, a Dominican friar, and a yeoman were condemned for saying that 'that venomous serpent, the bishop of Rome was the supreme head of the Church of England. (53) Viscount Lisle and Domine Gray were

(51) 1 How. St. Tr., 482.

(52) 1 How. St. Tr., 482.

(53) 1 How. St. Tr., 482.

attainted for heresies in doctrine. (54) Robert Barnes, Thomas Garret, and Willaim Jerome all were condemned 'for delivering heresies to induce his majesty's subjects to diffidence or refusal of the true sincere belief'. These three suffered death at the stake. (55)

There were numerous plots and small rebellions after the reformation acts. These were chiefly instigated by persons who still adhered to the Papacy. In 1540, Sir Adrian Fortisque was condemned by bill of attainder for endeavoring to raise a rebellion (56). Thomas Dingley, a knight of St. Johns of Jerusalem and Robert Grancester, a merchant, were attainted by parliament the same year for going to several foreign princes and persuading them to make war, and for assisting lords Dancy and Hussie in rebellion. (57) Sir Gregory Botolph, Adam Damplyp, Edward Brinkholm, and Clement Philpot were punished by act of parliament for adhering to the bishop of pome, corresponding with Cardinal Pole, and conspiring to betray Calais to the French or Spanish. Philpot had confessed, and he implicated the others. (58) In 1541, five priests, and tensecular persons were attainted for a rebellion in Yorkshire. (59)

(54) 1 How. St. Tr., 483-484. 32 Hen. VIII.

(55) Lords' Journal, (1509-70) 159; see also *roude Hist. of Eng.* III. 473.

(56) 1 How. St. Tr., 482.

(57) 1 How. St. Tr., 482.

(58) Lords' Journal, (1509-70) 159; 1 How. St. Tr., 483; see also *roude, Hist. of Eng.*, III. 472; 32 Hen. VIII, c.9.

(59) 1 How. St. Tr., 482. 32 Hen. VIII, c. 7.

Bird, Hungerford, and Lawrence Cook were each condemned by separate acts by parliament. (60)

Wolf's wife was attainted in 1534 for murder.

(91) Giles Heron, in 1540 was condemned for treason with no special matter mentioned in the bill. (62) There are no records to show that any evidence was presented to parliament before these acts of attainder for heresy and rebellion were passed.

Henry VIII, who began his reign with the reluctant execution by bill of his father's ministers, ended it with the attainder of his own long serving nobles, Thomas, duke of Norfolk, and the young Henry, earl of Surrey. Without attempting to enter into the controversy concerning the justice of the condemnation, a consideration of the times is essential to understand the passage of the bill.

Henry was slowly dying in 1546; the wound in his leg had become so serious that he was obliged to use a chair or couch continuously. The king had misgivings too concerning the future rule of his minor son. A protectorate was necessary if Edward was to reign after the death of his father, but who would be lord protector? A lat as king in a time of reformation and opposition might not be able to retain the crown. Meanwhile any plotting, any usurpation

(60) Lords' Journal, (1509-70) 159; 1 How. St. Tr., 483-484. 32 Hen. VIII, c. 10.

(61) House of Lords MSS. (Hist. MSS.) 1695-97 301; 25 Hen. VIII, c. 11.

(62) 1 How. St. Tr., 482. 32 Hen. VIII, c. 7.

of authority by ambitious and powerful nobles might imply designs on the kingship at Henry's death.

The duke of Norfolk had prior to the birth of Edward, prince of wales, and after the death of Catherine, been spoken of as a possible successor to the crown.(63) The king then, in 1546 and 1547 attached more importance to the smaller incidents and acts of assumed authority, than during his virile years.

Parliament had been called on January 14, 1547 presumably to crown the Prince of wales, and probaly in part to attaint the Duke of Norfolk. (64) On January 18, at the king's own wish expressed personally to several of the peers, a bill of attainder was introduced into the House of Lords, condemning the duke of Norfolk and the Earl of Surrey, his son.(65) The Earl of Surrey had already been tried for high treason by a special commission of peers at Guild Hall (January 13, 1547). He was found guilty by the commission, and had been bedeaded before the meeting of this adjourned parliament. (January 18, 1547)

After the first reading of the bill, it was sent to the solciter-general for examination. The crimes charged in parliament were that the Duke of Norfolk had

(63) Froude, Hist. of Eng., IV. 466, citing Guistiniani's letters from the court of Henry VIII.

(64) 1 How. St. Tr., 457 says 'not color enough to try Norfolk before his peers.

(65) 1 How. St. Tr., 457; Froude, Hist. of Eng., IV. 477 Lord's Journal, I. (1509-70) 175.

discovered secrets of the king's council; that he had concealed his son's treason in using the arms of Edward the Confessor; and that his own arms bore a difference in labels of silver, prejudicial to the king. (66) Surrey had been implicated in previous political plots. The Duke of Norfolk confessed to all these treasons. Yielding all, hoping by this to overcome the king's displeasure. (67)

The bill of attainder passed the Lords on the 20th, and the Commons on the 24th of January. "No one present at the sittings", wrote Chapuys. "Dared for his life sake open his mouth or say a word without watching the will of the king or council." (68) The Chancellor, Lord Wriothesley, on the 27th declared to both houses assembled together that the king desired the rapid passage of the bill for certain causes, among which was the appointment of an official of state to succeed Norfolk during the coronation ceremonies of the Prince of Wales. (69) The king being too weak to act, himself, had ordered a commission of lords to give his assent to the bill. This was done, and the attainder became a law. (70)

(66) 1 How. St. Tr., 457; Froude, Hist. of Eng., IV. 477. He bore on his shield the arms of England with a difference of labels of silver, which was the right of only the Prince of Wales.

(67) Parl. Hist., I. 365; 1 How. St. Tr., 457; Froude, Hist. of Eng., IV. 477.

(68) Quoted in S.R. Gardiner, History of England (1485-1541), V. 480. Gardiner cites Cal. State Papers, Spain VIII. 557.

(69) 1 How. St. Tr., 459.

(70) Lords' Journal, I. 289.



The Earl of Surrey and the Duke of Norfolk were attainted, as we have seen, without answer or trial in parliament. Surrey had been convicted at law of treason, and his father was attainted on the strength of his own confession. The king's conduct was political rather than vindictive, and at least in his own mind the means was justified. In accordance with precedent it was given a judicial covering and enforced by the king's most willing instrument,- parliament, in order to allay Henry's fear that Norfolk and Surrey were plotting for his son's crown. Thomas, Duke of Norfolk was not executed, chiefly because the king died on the 29th of January, and one of the first acts of the first parliament called under Edward VI was to repeal the bill, because of technicalities in it's signature (the repeal sets forth) and because "the only thing which he was charged was for bearing arms which he and his ancestors had borne, and which they might lawfully bear." (71)

This custom of common resort to attainder passed with the reign of Henry. Such bills had become more frequent, due in part to the enlargement of the scope of treason so, as to include heresy at a time when the church was made a department of state; to the willingness of parliament to cooperate with the king's efforts to maintain peace and order; to the decay of the common law courts and

common law justice; and to the stirring period of reformation, of wars, and of political movements through which England passed. These extreme measures can only be competently judged and censured with a full knowledge of the conditions of the time.

There were only two bills of attainder passed during the reign of the lad Edward VI, and both of these were directed against a conspiracy to obtain the position of lord protector to the young king. Thomas Seymour, Lord High Admiral of England coveted the position which his brother held, and through his plotting to obtain this office of lord protector to the king, Seymour lost his life.

Ever since 1547, Seymour, Lord of Sudley, had been active in his conspiracy, so that when sufficient proof was at hand the protector with little reluctance reported the facts of his brother's treasonable designs to the privy council.(72) The Seymour plot involved several persons,- the most noted of whom, next to the leader, was William Sharrington, master of the mint at Bristol. Sharrington had furnished the admiral with false money, and had already defaulted the government of some forty-thousand pounds, in silver. The mint master confessed, was sentenced to death at common law, and his penalty was confirmed by parliament in a bill of attainder.(73)

(72) 1 How. St. Tr., 443-487; Hunt and Poole, Hist. of Eng., V. 37-39.

(73) Commons' Journal, I.31; See also Froude, Hist of Eng., V. 150; Hunt and Poole, Hist of Eng., V. 38.

On February 25, 1551, a bill of attainder was brought into the House of Lords, against the Lord High Admiral of England. The accusations were that Seymour had attempted to get into his hands the governance of the king's Majesty and had used corruption to accomplish this treason; that he had procured from the king a letter of ill consequences, and had said that he would make parliament the blackest parliament that ever was in the kingdom; and that he had received bribes. (74)

The Lords, after the three necessary readings of the bill invited the assistance of the House of Commons and offered to present their evidence by certain nobles. The House of Commons accepted, heard the evidence, and passed the bill. It was proclaimed a law on March 5, 1551. (75) Seymours friends in the House of Commons objected to the passage of the bill because he was condemned without facing his accusers, although he was a peer. But the king's injunction that the admiral's presence was not necessary, hushed all dissention to the act. (76)

Mary came to the throne in 1553, after the illfated Jane Gray had ruled England for twelve days, through the influence of the Duke of Northumberland. The Earl of Pembroke, the Marquis of Northampton, the Earl of

(74) Parl. Hist., I. 587; 1 How. St. Tr., 496; Lord's Journal VII. 126.

(76) "But the king pleased that the admiral's presence was not necessary to the court, and therefore he need not be there". Parl. Hist., I. 588; 1 How. St. Tr., 494.

Warwick, and the Duke of Northumberland had persuaded Edward IV upon his death bed to will the throne to his cousin Jane, in order to save England from a Catholic Queen. Under the express authority of parliament Henry VIII had willed the crown to his daughter Mary, in case Edward VI should die without heirs. But Edward VI had no similar authority. However, through the efforts of a coterie of protestant nobles, Jane Grad did reign England as queen for a few days. But the friends of Mary Tudor rallied around her; Northumberland's army deserted, and the royal navy mutinied in favor of Mary. Then, within a few days Northumberland, Lady Jane, and the other principle leaders were seized and imprisoned.(77)

In August 1553, the Duke of Northumberland, the Earl of Warwick, and the Marquis of Northampton were tried before a court of peers at Westminster for high treason, and were found guilty. Sir John Gates, sir Andrew Dudley, and sir Thomas Palmer, were also convicted of treason by a special commission at Westminster.(77) On the 22nd of August, the Duke of Northumberland, Gates, and Palmer suffered death at the block.(78)

Parliament in November hastened to confirm by bill the attainder of the traitors. The act passed the house on November 17th, and was assented to by the queen on

(77) Froude, Hist. of Eng., VI. 15-46

(78) Froude, Hist. Of Eng., VI. 73, 78-81.

December 4th. There was included in the bill the names of John, duke of Northumberland; Thomas Crammer, Archbishop of canterbury; William, Marquis of Northampton; John, Earl of Warwick; Sir Ambrose Dudley; Knight Guylford Dudley Esq.; Sir John Gates Knight; and Sir Thomas Palmer.(79) All of the accused had pled guilty to their indictment so the attainder was for levying war against the queen, and conspiring to set up another in her stead. Guilford Dudley and wife Jane, were beheaded after the act of parliament, but Crammer was only imprisoned until later when after trial and conviction on the charge of heresy, he was burned at the stake.(80)

Mary's efforts to establish Catholicism together with her Spanish marriage project rendered heresy unpopular that in 1554 a plot was formed to depose her and put her sister Elizabeth on the throne. Sir Thomas Wyatt, a Kentish gentleman, and the Duke of Suffolk were the leaders in the conspiracy. The revolt gained considerable strength around Kent, and fighting took place in and around London. Mary successfully put down the rebellion, however, and the ring leaders were tried and convicted for treason. In 1554 a bill to confirm the attainder of the late Duke of Suffolk,

(79) Commons' Journal, I. 31; See also Rot. Parl., VI. Appendix CCL, "An act for the confirmation of the attainder of John, late Duke of Northumberland and others. La Reigne le veult.

(80) Parl. Hist., I. 611.

Sir Thomas Wyatt and others, was passed by the House of Commons and sent up to the House of Lords. The bill failed to pass until the next session, because the Lords objected to a clause in the bill forfeiting entailed lands of the attainted, and the Commons refused to strike it out.(81)

During the whole forty-five years of Elizabeth's reign bills of attainder were employed only on two occasions. In 1569, the Catholic nobles of the northern counties opened a correspondence with the Spanish ambassador, planning to release Mary, Queen of Scots, and place her upon the throne instead of Elizabeth. The plot became known and a course of open rebellion was resorted to by the nobles. Headed by the Earl of Northumberland, and the Earl of Westmoreland, an army marched toward York, where Mary was imprisoned. Their plans failed, because Mary had been moved from her prison at Tutby, and a hasty dispersal and retreat followed. The leaders fled to the continent.(82)

In 1571 a bill of attainder was passed against Piercy, Earl of Northumberland, Charles Neville, Earl of Westmoreland, and about fifty members of the best families of northern England.(83) The act forfeited all the land

(81) Parl. Hist., I. 615.

(82) Dict. Natl. Biog., XL. 245.

(83) The names of the others are not given in the Lords' Journal, "but Camden gives", according to the Parl. Hist. "Ann, countess of Northumberland, Edward Dacres of Morton, John Neville, John Swinborne, Thomas Markenfield, Egremont Ratcliff, Christopher Nevill, Richard Norton, Christopher Marmaduke, Robert and Nicholas Tempest, George Stafford, and forty more from the best families of northern England." Parl. Hist., I. 730.

and goods to the queen, and curiously the estates within the Palatine of Durham were passed to the crown rather than to the bishop, on the ground of the great expense to the crown "in freeing the bishop and his diocese from the rebels." (84)

A confirmation of attainder was passed against Thomas, late Lord Paget in 1587. (85) He had been forced to flee to Paris as early as 1583 because of his Catholic plotting and treasonable conduct. Immediately after his flight, all his goods and estates had been seized by the state (86), and the bill was passed more to guarantee the absolute title to the crown against any future claimant or heir from his family, than for the actual punishment it might do him.

The only attainder passed during James I's reign was directed against the members of the 'Gunpowder Plot' in 1604. A number of desperate fugitives from justice had planned to blow up the house of Parliament on the opening day of the session, and to destroy all connected with James government. The plot failed and the leaders in the treason were captured and tried at common law, or were killed while resisting arrest. Parliament and the king passed an act of attainder against these members of the

(84) Dict. Natl. Biog., XL. 246; Parl. Hist., I. 731.

(85) Parl. Hist., I. 963; Dict. Natl. Biog., XLIII. 59.

(86) Dict. Natl. Biog., XLIII, 59.

'Gunpowder Plot' at the same session which the conspirators had planned to destroy. The purpose of the bill was chiefly to make their offense more odious.

The attainder of Thomas, Earl of Strafford, Lord Lieutenant of Ireland, and President of the Council of the North, is the most important case discussed in this paper, for it reveals in the clearest manner the despotic power of parliament in dealing with political enemies. It is the most familiar incident of this kind in English History. The passage of this act was preceded by a discussion of great frankness, and the theory upon which the bill is based was exposed with brutal frankness.

Thomas Wentworth was in many ways the ablest man in England in his time, and his purpose and aim in public life was to establish a strong and efficient administration. For this purpose he believed the absolute form of government the best. His opposition to Charles at first was really directed against the inefficient Duke of Buckingham. During the Personal Rule of Charles ' (1629-1640), Wentworth found himself to be Charles most ardent adherent to the policy of royal absolutism. This chief minister of the king had held successively the important offices of President of the Council of the North; Lord Deputy of Ireland for seven years (1633-1639); and finally chief advisor to the king. Strafford's object, wrote Meaulay, "was to do in England all, and more than all, that Richelieu was doing in France; to make Charles a monarch



as absolute as any on the continent.(87) The king's policy to establish in fullest sense the royal prerogative was best promoted by calling very few meetings of Parliament, and thus keeping the legislative as well as the other machinery of government under his own control and supervision. The greatest disadvantage lay in the lack of legal ways to collect taxes and revenue with which the government might be carried on. Quasi-legal means used to get money made considerable feeling against the ruler, and many began to believe that some permanent check should be put on the power of the sovereign.

The 'Long Parliament' which met November 3, 1640 was composed of men who believed in limitations on the monarchy. It was not subservient to the king, as had been the Tudor assemblies. While respectful, it was not submissive.

The attack on the King began by charges against his chief minister, and on November 11th, - only eight days after the beginning of parliament, - the House of Commons through John Pym accused Thomas, Earl of Strafford, of high treason before the House of Lords, at the same time requesting that the prisoner be taken into custody while the "Articles and Grounds of his Accusations" were being drawn up.(88) The Lords at once committed

(87) Macaulay, History of England, I. 67

(88) 5 How., St. Tr., 1382-1383; Parl. Hist., II. 733.

the Shafford to the chief usher. (89)

Within a fortnight the articles of accusations were read to a joint conference of both houses. The charges were that the earl of Strafford had traitorously endeavored to subvert the fundamental laws and government of the realms of England and Ireland, and had introduced instead an arbitrary and tyrannical government against the law; and by his traitorous words, actions, council, and advice to the king, he had compelled submission throughout by the people; that he had exercised with tyranny a regal power over the lives and liberty, lands and goods of subjects in England and Ireland. The Earl of Strafford was accused of not accounting for the revenue which he had received, and appropriating it to his own use; with encouraging popish heresies; with stirring up hostility between England and Scotland; with the betrayal of his army at Newborne, and the town of Newcastle into Scottish hands; and finally that he had labored to subvert the right of parliament, and the ancient course of parliamentary proceedings, and by false and malicious slanders to incense his majesty against Parliament. (90)

Twenty-eight articles with specific instances of treason

(89) 5 How., St. Tr., 1383; Commons' Journal, II. 35.

(90) The whole of the articles of accusation are found in 5 How., St. Tr., 1385-1386; or Parl. Hist., II. 737-738.

were submitted at the same time.(91) The earl did not answer the accusations until the 24th of February, and then he read before the House of Lords a paper of concrete denial and explanation. A month passed before the trial was opened.(9 2)

The hearings began on the 22nd of March in Westminster Hall. The impeachment was conducted by leaders appointed by the House of Commons. The case of high treason presented by the Commons was weak. The difficulty lay in the positive sanction and warranty by the king of all of the earls acts, and the fact that the law of High Treason, which was the statute of 1352 provided for treason against the person of the king, not against the government. The trial proved that Charles I had an obedient and faithful minister.(93) Conviction then, seemed impossible because only constructive treason could be made out of a multitude of acts which were not in themselves treasonable; and because the best specific charge was not substantiated by two witnesses as required by law.(94)

(91) For the 'Twenty-eight articles' see 5 How. St. Tr. 1387 1401.

(92) For the answer of the earl of Strafford see 5 How., St. Tr., 1401-1413.

(93) Statute of 25 Edward III shows the relation of treason to the king,- "That if any man shall intend the death of the king, his queen, their children, kill the chancellor or judge upon the bench, - etc. he shall be punished and convicted as a traitor.

(94) "To make up the constructive treason or treason by way of accumulation, many articles are brought against me, as if in a heap of Felonies, and Misdemeanors, for their conceit they reach no higher; some prolific seed, apt to produce what is treasonable, could lurke. 5 How. St. Tr., 1463.

Only Henry Vane, out of the eight members of the privy council swore to the charge that the Earl of Strafford had advised the king to use the Irish army to reduce this kingdom to obedience. (95) Strafford produced four of the council who denied that such a statement had ever been made before them. The statement, if made at all, could refer only to Scotland, as Strafford said, in the course of the Bishops Wars, not to England. Pym who was conducting the proceedings for the Commons made a remarkable attempt to justify constructive treason by personifying the state in the king, that whoever attacks the state attacks also the king, and is guilty of his treasonable acts against the king who embodies the state. 'The worst traitor', he decided, 'is not he who attacks the sovereign's person or government, but who attacks the sovereign in his political capacity and by undermining the law which constitutes his greatness exposes him to ruin! (96)

By the 10th of April impeachment appeared so

(95) For the testimony and notes of Secretary Vane delivered at the Council table, the morning of the day the last parliament was dissolved. See Parl. Hist., II. 444-446; 5 How., St. Tr., 1459-1460. "There were eight present at the debate; two of them (The archbishop and Secretary Windebank) cannot be produced. Four remain for evidence,- the Marquis of Hamilton, The Earl of Northumberland the Lord Treasurer, and Lord Gottingham. 'All of these have declared upon their honors that they never heard me speak these words nor any the like.' Parl. Hist., II. 746.

(96) 5 How., St. Tr., 1466.

hopeless that the house of Commons fell back upon the Tudor weapon.(97) A bill of attainder was brought into the Commons by Sir Arthur Hasterig.(98) The reason for the change in front was apparently that impeachment would not stick, and the tone of the House of Commons was "not what should be done, but what must be done, that that Lord Strafford die."(99) "The Jonah who through many years had tossed and hazzarded the ship of the Commonwealth with continual storm and tempest," concluded Glyn of the Commons, "must be cast into the sea."(100)

The legal basis for the bill was the salvo (101) of the treason act of 25 Edward III which provided "that the king and parliament hath power to determine what is treasonable and what is not".(102) The Commons intended to set out the proved matters of fact in the bill, and then

(97) Parl. Hist., II. 744. On the 10th of April the impeachment proceedings ended with much confusion. Men declared "that the House of Commons would declare him a traitor, and all such Lords too as were his adherents; that he should not be heard in public; that though parties and not peers, they should vote in his sentence; that a bill of attainder should be presently drawn against him, and that nothing should content them but the present execution." 5 How. St. Tr., 1461.

(98) 5 How. St. Tr., 1469; Parl. Hist., II. 749.

(99) "His very enemies will confess that it is done more for necessity than for justice; and rather for the satisfaction of rancorous apprehension, than for guiltiness in the cause." 5 How. St. Tr., 1477.

(100) 5 How. St. Tr., 1469.

(101) The salvo is the exception clause in a legislative bill.

(102) 5 How. St. Tr., 1469.

to attain the Earl of Strafford under the broad scope of subversion of the fundamental law, making for the first time subversion of the fundamental law an act of treason.

(103) The despotic bill in itself would be comparable only with this newly made, and loose indefinite addition to the statute of treason. Three of the lawyers of the Commons, Selden, Holborne, and Bridgeman protested that the salvo of 25 Edward III had been twice repealed, but the House of Commons had already layed their course and proceeded. (104)

The impeachment hearings were tactfully continued, however, and strenuous efforts were made by the Commons to show the Lords the expediency of attainder. The bill was read for the second time on the 14th of April, and then was committed to the committee of the whole of the lower house. (105) There was a conference between the houses the next day, and the Commons made their declaration

(103) 5 How. St. Tr., 1469. "It seems the House of Commons had perceived a great defection of their party, and a great increase of Lord Strafford's friends in both houses, occasioned by his insinuating, honesty and witty defenses, and therefore resolved of no more hearings in the public; therefore it was thought upon his accusers to draw up a bill of attainder and present the same to the Lords; whereby, first the matter of fact whould be declared to have been sufficiently proved; and then the matter of law, that he had incurred the censur of treason, for intending to subvert the fundamental laws of the kingdom; for though (said they ) he cannot be charged by the letter of the statute of 25 Edward III, yet he is within the compass of the salvo,... and they were confident the Lords would ratify and approve of this bill of theirs and give judgment accordingly".

(104) 5 How. St. Tr., 1469-1470.

(105) Parl. Hist., II. 749.

'that the eviience of fact being given, it was proposed from the beginning to go by way of bill; that they had accordingly brought in a bill of attainder. That the proceeding by bill stood no way in opposition to the proceedings that had already been in the business."(106) Another conference was held on the 16th.(107)

On the 21st of April the final reading and the engrossing took place, and then the bill was passed in the House of Commons by a vote of 204 to 59.(108) There was some determined opposition to the act; Lord Digby spoke against the bill with such heat that he was called upon by the House of Commons the next day to explain himself.(109)

Mr. St. John in his speech before the house of Lords on the 29th of April, expressed with candor the arguments for using a bill of attainder.(110) He had been commissioned by the House of Commons to justify their proceeedure. St. John maintained that parliament had the power to make new laws or change old ones as it willed.(111) that the forms of law stood in the way of sufficient

(106) Parl. Hist., II. 749.

(107) Parl. Hist., II. 749.

(108) Parl. Hist., II. 754; for the list of the members of the House of Commons voting against the attainder see ibid 756-757.

(109) Parl. Hist., II. 750; The whole speech is given, and on ibid 754 the demand for an explanation appears.

(110) Mr. St. John's argument concerning bills of attainder is given in full in 5 How. St. Tr., 1477- 1512.

(111) 5 How. St. Tr., 1478.

judicial satisfaction as to the charges and as to the proof against the Earl of Strafford, but the testimony was satisfactory to the private conscience even if not in a judicial way. Treason had been proved and want of jurisdiction in the judicial way might be supplied by bill. He attempted to justify constructive and accumulative treason, at the same time by specific acts showing how the acts of Strafford proved were treasonable. "In the case as it stands", he said, "it is just and necessary to resort to the supreme power of parliament in case all the rest should fail", (112) St. John concluded by citing instances where crimes and offenses at law were heightened and the punishment increased upon the first offenders by bills of attainder. He referred to the Richard Cooke act in 24 Henry VIII c.9; and the bill against Elizabeth Barton in 25 Henry VIII, as instances of crimes at law being heightened by attainders. (113)

This cold blooded discussion of the justification of parliamentary act, where the courts of justice fail, cannot be passed without comment. The House of Commons purposed to behead the earl of Strafford by whatever method or resort necessary. 'Stone Dead', said Pym. After impeachment and satisfactory judicial evidence became impossible; when the charge of constructive treason had failed, then the Commons baldly declared that it was just

(112) 5 How. St. Tr., 1480.

(113) 5 How. St. Tr., 1512.



and necessary to resort to the supreme power of parliament in order to accomplish their end.

The House of Lords still hesitated to pass the act of attainder. Many of the nobles were piqued at the change from impeachment, which was judgment by Strafford's peers, to attainder. Surely, all possible pressure was brought to bear upon the members of the upper house. Numerous petitions were presented to them for the execution of the traitor. There were riots among the London citizens, who clamored for Strafford's death. (114) The names of the members of the House of Commons who voted against the bill of attainder were posted in the city under the title, "These are the Straffordian Betrayers of the Country". (115) Mobs stormed the doors of the Parliament house. Business and trade were stagnant under the political suspense. Many of the Lords feared the anger of the people if the bill was not passed. (116) Finally the Lord Justice of the Kings Bench delivered a unanimous opinion to the upper house, "that upon all which their lordship have voted to be proved, the earl of Strafford doth deserve to undergo the pains and forfeitures of high treason. (117) With cries

(114) Parl. Hist., II. 755; Historical MSS: Lord Montagu of Beaulieu, 129. In a letter from Edward Montagu to his father Lord Montagu at Barnwell, May 8, 1641 is the news,—"Since my coming to London here, there have been great tumults and disorder, especially about Westminster by reason, as the common people say that they have not had justice against my lord Strafford."

(115) Parl. Hist., II. 756-757,

(116) 5 How. St. Tr., 1514.

(117) Parl. Hist., II. 757-758.

from the mob for justice coming through the door, the Lords passed the bill by a vote of 26 to 19.(118) Less than one third of the total membership was present.

The passage of this act put Charles I in serious straits, for while Strafford was still in northern England, the king had urged him to come to London assuring him that if he came 'he should not suffer in person, honor, or fortune.(119) Wentworth hesitated to risk himself before the new parliament. He knew the intense feeling of hostility against him; but on the king's own assurance he obeyed the summons. Charles had attempted to interfere in the parliamentary action against the Earl of Strafford; during the course of the impeachment trial he had sent a letter to the Lords urging that body to at least save Strafford's life.(120) There was an excited mob around his palace at Whitehall when the bill of attainder came to Charles for signature. There was intense feeling; rumors

(118) Parl. Hist., II. 757; The Lord Clarendon says 'that these unheard-of-acts of insolence and sedition continued so many days till many of the lords grew so really apprehensively of having their brains beaten out, that they absented themselves from the house; and others finding what seconds the House of Commons was like to have to compass whatever they desired, changed their minds; and so, in an afternoon when of the four-score who were present at the trial there were only forty-six Lords in the house, (the good people still crying at the door for justice) they put the bill to question,... and it passed the house". 5 How. St. Tr., 1514.  
(119) S.R. Gardiner, History of England, (1603-1641) IX.221.  
(120) Rushworth, Historical Collection, IV. 265; cited in Cheney, Readings on English History, 472.

were current concerning the queen's treasonable correspondence with the rules of Holland and France, for foreign troops to maintain the absolute rule.(121) The clamor became loud for Charles' assent to the act, and there were threats against the king and his queen, if Strafford was allowed to live. Charles hesitated as long as he dared, for the danger to himself and the queen was real. Strafford had already sent the king a letter releasing him from his promise to save him, if such a course was necessary for his own safety and position.(122) Finally, on the 10th of May, while a mob of tradesmen and shopkeepers threatened to break into the palace, and the judges and counselors urging him to do his duty to the land, Charles I assented to this bill of attainder for the beheading of his most faithful minister.(123) And Strafford, in the tower on hearing of the King's act, "lifted up his eyes to heaven, laid his hand on his heart, and said, 'Put not your trust in princes nor in the sons of men, for in them there is no salvation. (124)

The bill itself contains the charges of the impeachment, and the accusation of Vane,"that he did counsel

(121) S.R. Gardiner, History of England (1603-1641), IX. 244.

(122) Whitlocke, Memorials, 43; cited in Cheney, Readings in English History, 471.

(123) Parl. Hist., II. 759.

(124) Ibid, 759.

and advise his Majesty 'that he was loose and absolved from the rule of the government, and that he had an army in Ireland by which he might reduce the kingdom; for which he deserves to under go the pains and forfeitures of treason"... "all of which have been sufficiently proved against the said Earl upon his impeachment." (125) A new and significant clause is found in this bill of attainder:- "Provided, that no judge or judges, justices or justices whatsoever, shall adjudge or interpret any act or thing to be treason, nor hear or determine any treason in any other manner than he or they should, or ought to have done before the making of this act, and as if this act had never been made." (126) This clause then, made the new treason (that is, the subversion of the fundamental laws) void after its use against the Earl of Strafford. Parliament, then, feared the effects of broad construction of its own creation, and hastened to abolish it as a precedent to inferior courts at the time of its establishing. It admitted by this clause that the sole purpose of the creation of the new treason was to take the life of the Earl of Strafford. Fear of Wentworth's escape if the trial was interrupted was responsible in part at least, for the clause preventing the dissolution of Parliament without its own consent.

~ (125) The entire bill of attainder is given in 5 How. St. Tr., 1518-1519.

(126) 5 How. St. Tr., 1519.

The impeachment proceedings are of value to attainder only as they show the basis for the bill and the reason for its passage. The difficulty with the original process was that treason had always been defined as against the king, and Strafford had in no way acted against his sovereign. The Commons, who were bound to destroy the minister resorted to, the charge of subverting the fundamental governance of the realm, and determined that they should judge the Earl of Strafford guilty of it by bill of attainder. To do so, they had to make the charge into a new treason. (127)

The loose construction possible under such a clause and its use even in the first instance was too

(127) "An endeavor to subvert the fundamental laws was a specie of constructive treason, till then unknown and was established on facts which were either indifferent in themselves, or insufficient separately to constitute such a crime. The evidence against Strafford was defective, however, as it indicted rather his advice and opinion, than a concealed design to render Charles independent of parliament. He suffered without legal evidence from the violence of his accusers. 'Lang's Reflections; quoted in 5 How., St. Tr., 1416n.

"The same arbitrary confusion of right and wrong, encouraged the Parliamentary leaders in Charles 1st time to charge Lord Strafford with having subverted the laws, and thereby committed high treason. It was this article which they labored the most and perhaps judged rightly; because by being general and indistinct, it was capable of embracing any offense that malice and faction could find no name for. They could not attempt this with effect, if the law of treason had been properly defined; or if the minds of men, the learned as well as the vulgar, had not been obscured or the doctrine of adjudged cases." Luders, on The Law of High Treason in Levying War, 83; cited in 5 How. St. Tr., 1416n.

dangerous. The makers of the new clause were aware of its elasticity and indefiniteness, for they provided that this act of attainder against the earl of Strafford should not alter the law of treason, nor be a precedent to the courts of law. While the purpose of the new clause provides for such a future contingency, the words make plain the reason for the creation of the new treason,- the resolution to send this one man to the block with or without law.

The theories of accumulative and constructive treason were too far fetched. But the persecutors were determined to behead Strafford. A bill of attainder passed the House of Commons, and then mobs, riots, the opinions of envious common law judges, who hated the encroachment of the king's court of Star Chamber and Privy Council and were glad to attack one of the council members, were used to intimidate and convince members of the House of Lords to vote for the bill. Many of the peers were frightened away from the session on the day of the vote, for only 46 were present, and even then the majority for the bill was only seven. Public sentiment against bills of attainder began with the act against the Earl of Strafford, because the notorious and flagrant procedure was openly laid bare to the English people.

The House of Commons condemned the New Canons written by Archbishop Laud, on December 16th, 1640, as

against the fundamental laws of the realm and the king's preoragative, and as tending toward sedition. At the same time they ordered Laud to be impeached for high treason, and appointed a committee to prepare charges against him.

(128) The archbishop was committed to the tower, where he remained without hearing until June, 1643. (129)

The impeachment proceedings were pressed before parliament in 1643, and all the evidence collected was given to the Lords under oath. On Tuesday, December 17, the House of Lords with fourteen present, voted Dr. William Laud, Archbishop of Canterbury guilty of endeavoring to subvert the fundamental laws; to overthrow the protestant religion; and of being an enemy to parliament. (130) The judges in parliament however, held that nothing charged was treason "by any known and established law of the land". (131)

But attainder may be accomplish by argument and weak evidence what impeachment cannot, so an ordinance of attainder (132) was passed by the House of Commons on the 16th of November, (133) and was finally concluded by the Lords on the 4th of January. (134) There was opposition

(128) 4 How. St. Tr., 315-316.

(129) 4 How. St. Tr., 318.

(130) 4 How. St. Tr., 598.

(131) 4 How. St. Tr., 598.

(132) After February 1642, and the outbreak of the first Civil war Charles never signed any bills, and all the acts passed were called ordinances. Many of these ordinances were passed without even consulting the House of Lords.

(133) 4 How. St. Tr., 597.

(134) 4 How. St. Tr., 599.

in the House of Lords to both the treatment and the means. The Earl of Pembroke in sarcasm wondered "if the Lords would put off giving consent to the ordinance till the citizens came down and called for justice, as they did in the Strafford case".(135) The Lord Admiral hesitated at passing such a bill because the Archbishop's acts were not within the statute of treason of 25 Edward III which he said was the only statute of treason. But he was answered by the Judges 'that there were treasons at common law which were not within the statute nor taken away by it; and that divers of these treasons were treasons against the realm; Of what constituted treasons that are against the realm or at common law the parliament is the only judge, and no inferior court can judge them but upon the declaration of parliament. Finally, that ever since the Statute of Edward III, Parliament has adjudged things to be treason.(136) On the 6th of January, it was ordered that Thomas Laud should suffer death on Friday 10th. The king's signature was never asked for or given. Parliament assumed absolute authority in the case of the so called treason of the king's minister. (137).

(135) 4 How. St. Tr., 597.

(136) 4 How. St. Tr., 597.

(136) Lords' Journal, VII. 125.

(137) "Be it therefore ordained by the Lords and Commons in this present parliament assembled and by the authority of the same. 4 How. St. Tr., 599-614.



The act entitled an 'Ordinance of Attainder' is modeled after the bill drawn against the Earl of Strafford. The charges which it contains are:- subverting the fundamental law; altering God's true religion and setting up popish idolitry; and subverting the rights of parliament. The charges are concluded with the assertion that the offenses have been sufficiently proved upon impeachment. (138)

There is the same provision that 'no judge shall interpret any act or thing to be treason or change the manner of hearing treason, in any other manner than he did before this ordinance had been made, and as if the ordinance had never been made.' Strictly speaking the attainder against the Archbishop of Canterbury was not a bill of attainder, for it was not passed with the regular procedure of a bill but it was the first instance in cases of attainder where parliament disclaimed the king as an essential part of the procedure to legally condemn and execute for high treason. (139)

At the restoration of the monarchy in the person of Charles II in 1660, one of the three vital questions confronting parliament was the treatment to be accorded the rebels and the leaders of the Cromwellian army. Charles by his declaration at Beda had granted

(138) For the whole bill see 4 How. St. Tr., 599.

(139) 4 How. St. Tr, 599; 614,- They never sought the king's signature.

amnesty to all, excepting those whom parliament should exempt from pardon. Under the extenuating circumstances of the last king's death, some punishment it would seem, had to be inflicted in order to impress the people, but the number which parliament condemned was not large.

On December 7th an act 'for the attainder of several persons guilty of the horrid murder of his late sacred magesty Charles I' was passed. The bill confirmed the conviction of twenty-four persons already condemned at common law,-- ten of whom had been executed before the passage of this instrument. Nineteen, who had fled from the country; and four, Cromwellton, Pride, and Bradshaw, who were dead before the monarchy was restored, were included in the act in order that their names should be besmirched and their property forfeited to the crown. These four leaders were declared 'to be convicted and attainted to all purposes and intents as if they had been attainted in their life'. (140) There were fiftythree persons punished by the act, and these included only the most noted members of the commonwealth, and the thirteen regicides. The bill confiscated the lands of all named in the bill 'whereof they were fiefed on March 25th, 1646, and all personal property possessed on February 11, 1659. Certain

(140) For the act see 1 Charles II, c 30.

conveyances against these estates, however, whose purpose was not to defeat the act of attainder, were maintained. (141)

Under the king's position, that parliament should make the exception to amnesty, and bear the blunt of popular approval or disapproval, attainder was the only practical and public method. And the number under the circumstances was not large. The bill came as a demand for vengeance, but it was also done to impress the position of the monarchy upon the people.

While Charles II leaned strongly toward papal practices, his brother James II. who ascended the throne in 1685 was an openly avowed Catholic. The excesses of the Whig party had thoroughly discredited them before the people, and the Tory party who came into power at the accession of James, had always favored the royal prerogative. Besides the public felt that James II would not interfere with anclican church, and at his death, his daughter Mary, the wife of the protestant Prince of Orange, would succeed him.

James Scott, duke of Monmouth and Buccleigh was a natural son of Charles II. (142) He had been implicated in the famous Rye House Plot against the throne in 1683, and had been banished from England by his father. (143).

(141) 4 How. St. Tr., 155; House Journal, VIII. 26-27.

In 1677 Thomas Dolman was attainted for a treasonable declaration against the king. 17 Car. II. c.5.

In 1691 the earl of Danby suffered under a bill of pains and penalties for a treasonable plot. 31 Car. II. C. 14.

(142) Dict. Natl. Biog., LI. 28.

(143) Macaulay, Hist. of England, I. 412.

Effeminate, yet ardent, the Duke of Monmouth had one valuable political possession,- he was a protestant and a descendant of the late king. In 1685 the Duke set out upon his expedition to secure the English throne, from Holland in three ships. His force landed at Lyme Regis on the west coast of England June 11th. A numerous rabble of some five thousand persons rallied to his support, and the pretender began his march toward London. (144)

The news of the landing was brought to the king by messengers dispatched by the mayor of Lyme Regis from Honiton. On June 13, James gave all of his information concerning the invasion in a message to parliament. The house of Commons immediately examined the messengers who brought the news, without administering the oath, and then satisfied, they ordered a bill of attainder to be brought in. (145) The bill was read three times and passed, in the lower house, on the same day, and on the 16th of June the Lords in as hurried proceedings passed the act of attainder. (146) The rapidity of this condemnation, passing each house in a single day where life was involved, was extraordinary as well as summary. James hastened to give his royal assent and the bill became a law on June 18th 1685.

(144) Macaulay, Hist. of Eng., I. 445-448; Dict. Natl. Biog., LI. 34.

(145) Macaulay, Hist. of Eng., I. 450; Dict. Natl. Biog., LI. 36; 11 How., St. Tr., 1041.

(146) Commons' Journal, IX. 735-737; How. St. Tr., 1041.

This act attainder, was little more summary than most of the instances of legislative judgment without judicial trial. The landing of Monmouth could not be interpreted in any other light than against the crown. Macaulay in his 'History of England' makes the following comment:- "When we consider how important it is that legislative and judicial functions should be kept distinct, how important it is that common fame however strong and general, should not be accepted as legal proof of guilt, how important it is that no man should be condemned to death without an opportunity of defending himself, and how speedily and easily breaches in great principles, when once made, are widened, we shall probably be disposed to think that the course taken by parliament was open to some objection. Neither house had any thing before it which even so corrupt a judge as Jeffreys could have directed a jury to consider as proof of Monmouth's crimes. The Lords who might have administered an oath, appear not to have examined any witnesses and to have had no evidence except the letter of the mayor of Lyme, which in the eyes of the law was no evidence at all." (147) On July 6th, at Sedgemoor the Duke of Monmouth was defeated and captured,

and on the 15th of July he was beheaded under warrant of the bill of attainder. (148)

The king's own tyranny and impolitic actions toward the toleration and advancement of Catholics turned his subjects against him. The people were well alarmed when on June 10th, 1688, a son was born to the king and queen. The hope that James's eldest daughter Mary, whose husband was William prince of Orange, the leader of the Protestant League on the continent, and herself a strong protestant, would be the next ruler of England was almost destroyed, and visions were had of long years of

(148) For the whole bill of attainder see 1 James II.c.2.; Dict. Natl. Biog., LI.36.

Edward Hyde, earl of Clarendon and Lord Chancellor of England was punished by a bill of pains and penalties in 1668. He had been Charles II. chief minister from 1663 to 1667. The king, however, differed with Clarendon on the national religious problems and on matters of the king's private conduct. Clarendon's dismissal from office followed a contest between the House of Commons and him over the accounting for of all the expenditures of taxes collected. The Lord Chancellor held that such a practice would restrict the freedom of action of the monarch and was impolitic. The Earl also received the blame of the failure of the second Dutch war.

But Charles was already tired of his ministers theories on religious and moral life, and in order to appease the anger of parliament and the public, the Earl of Clarendon was asked to resign. Once this minister was dismissed Parliament decided to inspect all the records of expenditures and to impeach the Earl of Clarendon. The king ordered his former minister to flee, and immediately after his departure a bill of pains and penalties was brought in against the Earl of Clarendon, making him a perpetual exile for life, and disqualifying him from ever holding any office in England.

Catholic rule and an odious alliance with Louis XIV of France.

Vigorous action seemed necessary, so a number of prominent men, - nibles, Whigs and Tories, who thoroughly hated and distrusted James, invited William of Orange and Mary to come to England to preserve the liberties of the nation against the king's encroachment. Shortly after William landed in western England with an army, James fled to France, and on February 13, 1689 William and Mary were proclaimed king and queen of England.

During the late monarch's reign the power of the papal party had increased. They could hardly be expected to become zealous subjects of William, when their true catholic king James still lived in exile in France. Consequently many conspiracies and plots were formed against the protestant William and for the restoration of James II.

Sir John Fenwick was a Jacobite and a persistent plotter against the crown. He was an active in the assassination plot in 1696, and in the movements to raise troops in England for James. (149) While in hiding from the agents of the government, Fenwick conceived the idea of saving himself from the fate of his friends Charnock and Parkyns, who had been punished for treason in the Royal Courts. Only two men, Porter and Goodman, knew

(149) Dict. Natl. Biog., XVIII. 330; Macaulay, Hist. of Eng., V. 129.

enough to be dangerous witnesses against him, and under the law of treason the testimony of two witnesses to the fact were required to convict.(150) Fenwick planned to bribe one or both of these men to leave England. Money was raised and negotiations carried on with Porter, but at the last Porter wavered and revealed the dealings to the government.(151) At the next session of Oyer and Terminer in London, a grand jury found a true bill of indictment against him for high treason, and both Porter and Goodman appeared and testified.(152)

Fenwick was captured soon afterwards, while attempting to flee to France. Immediately, the Jacobites succeeded in Sir John's scheme, and bribed Goodman to leave England, so that conviction was impossible in royal courts under the law of High Treason.(153)

When called before the House of Commons to confess, Fenwick refused unless pardoned.(154) Parliament knew that one of the witnesses had disappeared and was now

(150) Treason Trial Act, 7 and 8 Will. III. c.3. This statute provides that two witnesses to the same overt act of treason were necessary to conviction; that the accused was entitled to a copy of the indictment five days before trial, a panel of the jury two days before trial, the assistance of legal counsel and advice, and processes to compell witnesses to appear for his defense.

(151) Macaulay, Hist. of Eng., V. 130-131; Dict. Natl. Biog., XVIII. 330.

(152) 13 How., St. Tr., 547; Macaulay, Hist. of Eng., V. 132.

(153) Macaulay, Hist. of Eng., V. 132-133.

(154) 13 How. St. Tr., 538-542.



confronted with a dilemma,-either to resort to an odious bill of attainder, or to allow this man to escape from conviction of treason in the common law courts. On November 6, 1696, a motion was made for leave to bring in a bill of attainder against Sir John Fenwick, and after considerable debate it was passed by a vote of 179 to 61.(155) The Tory party opposed such action as a violation of the first principles of justice. While the Whigs, who had brought in the motion, were much enraged over the disappearance of the bribed witness.(156)

The bill, prepared by the attorney and solicitor generals, was put for second reading by a vote of 196 to 104. At this time several heated speeches were made. One John Manley, a Tory, went so far as to declare that the Whig majority was betraying the liberties of the people. He was sent to the tower by the House of Commons soon afterwards for this rash statement.(157) Fenwick was granted a copy of the order for the second reading of the bill, and was allowed two counsel and a solicitor.(158) On November 13th, at his own request, Fenwick appeared in the House of Commons and heard the bill read.

The speaker opened the hearing by declaring the intention of the bill:- "that you may not go unpunished,

(155) Macaulay, Hist. of Eng., V. 151. 13 How. St. Tr., 542.

(156) Macaulay, Hist. Of Eng., V. 151.

(157) Ibid. 152.

(158) 13 How. St. Tr., 542-543.

if you are guilty... a bill has been brought into this House of commons to attaint you for high treason, which hath been once read,... You will hear the evidence against you and have liberty to make your defense... Your counsel will not be allowed to question the power of parliament to pass bills of attainder, when they judge it requisite; of which this house is the more proper to judge than private persons."

(159) Fenwick's counsel during the trial were Sir Thomas Powis and Sir Bartholemew Shower. (160)

The second reading took place on Monday November 16, and the evidence was ordered produced. Sergeant Gould, who managed the trial, was intrusted by the House that he was at liberty to show not only concerning the allegations in the bill of attainder itself, but all facts which would prove Fenwick guilty of high treason. (161) The intention of parliament through-out the whole proceedings was to punish Fenwick for treason acts of which he was no doubt actually guilty.

Captain Porter, the first witness called, swore to Jacobite meeting at Kingshead in Leadenhall street, and another meeting in Pall Mall, both held to consider means for bringing king James back to the English throne. He said

(159) 13 How. St. Tr., 546.

(160) Macaulay, Hist. of Eng., V. 152, Macaulay adds that these two barristers were generally employed by Jacobite culprits. 13 How. St. Tr., 543.

(161) 13 How. St. Tr., 577.

that John Fenwick was present at these meetings, and that Charnock was requested by the persons assembled at Pall Mall, to go over to France and acquaint James of their intention. (162)

Strenuous objections were made by the prisoner's counsel to the admission of evidence concerning the bribery of the missing witness, Goodman, because the prisoner was in close confinement at the time and could not have had a part in it, and because Lady Fenwick's words could not be used as evidence against him at common law. (163) But the presence of an allegation in the bill charging him with complicity in the bribing gave the house ground for allowing such proof. (164) The record of Clanc7's conviction was then read to show that Goodman's absence was accomplished by bribery. (165) The reading of such evidence was clearly contrary to the rules of common law. (166) The testimony of Cordel Goodman, given at the hearing of the grand jury under oath and signature, was also allowed to be read to show that Goodman's absence was accomplished by bribery.

(162) Ibid, 580-581.

(163) Ibid, 581-582.

(164) 13 How. St. Tr., 583.

(165) Ibid, 590-591.

(166) Ibid, 593n; 'The evidence which a witness gave on a former trial between the same parties has after his death been read in civil action; but this is not allowed in Criminal prosecution. Peakes Law of Evidence, c.2, s. 2. art. 20; quoted in 13 How. St. Tr., 593.

This evidence corroborated the account of the meetings at Kingshead and Pall Mall, and gave some account of Fenwick's task to list all of the available troops and men in England ready in case James and an army from France should invade.

(167) Finally several of the members of the original grand jury recounted what they heard before returning their indictment. Gracedue and Meade were called for that purpose. The examination of witnesses, the reading of the lower court records, and the arguments of the counsels took three days.

(168) Fenwick's solicitors were not allowed to examine any of the witnesses, and offered no evidence for the defense.

The proof given was not legal, nor conclusive. There was hearsay, irrelevant matter, and evidence at other trials introduced, which could not have been properly admitted at common law. Two witnesses were not produced to testify to the overt act,— the two meetings,— and nothing could lawfully take the place of them. The examination of the jurors as to the testimony given before the indictment was quite irregular. However, the House of Commons did not consider itself tied to common law, and only to the rules of common equity. (169) They took all of the evidence offered them in order to decide whether Fenwick was

(167) 13 How. St. Tr., 607-609. It was only admitted after the question was put to a vote and the evidence allowed by a vote of Yeas 218, Noes 145.

(168) 13. How. St. Tr., 610.

(169) 13 How. St. Tr., 598. from the speech of Thomas Dyke.

guilty, (170) For attainder in parliament was never accomplished by judicial proceedings.

The debate in the lower house over the passage of this bill was very sharp and heated. They argued not the question of Fenwick's living or dieing, but the consequences of the bill of attainder, (171) its expediency, and the precedent that would be created. On the 24th of november, the bill was finally committed to the committee of the whole by a vote of 182 to 128, and on November 25th Fenwick was voted guilty of treason. (172)

By all of the evidence introduced, Fenwick was clearly proved to be guilty by the 'Whig managers of the Facts', but his trial at common law had been docketed for hearing. This great precedent would break the principle of the necessity of two witnesses for conviction of high treason. Yet Fenwick's escape was certain unless parliament acted.

Edward Seymour, a leader of the Tories declared in a brilliant speech, that two witnesses for convictions of treason were necessary by natural, and all law. He quoted divine authority from Numbers "that no man is to die upon single evidence." His closing argument was dramatic, / "What this precedent may make, no man can foresee. This bill is against the law of God; against the law of the land; it

(170) 13 How. St. Tr., 598; from the speech of Sir. G.R. Bridge

(171) Macaulay, Hist. of Eng., V. 160; 13 How. St. Tr., 712.

(172) 13 How. St. Tr., 726-728.

does contribute to the subversion of all governments, and no government can be without them, if you subvert these rules, you destroy the government; and therefor for these considerations, no one will think it strange, if I give my negative to this bill." (173) The act passed the House of Commons by a vote of 189 to 156 on the 26th of November. (174)

In the House of Lords, the same question of the effect of attainder was debated, "If law, the security of mankind was broken, would any man in the realm be safe? When the law of England provided for two witnesses at the trials for treason, could expediency justify the breach of the rule? Bishop Burnet declared for the bill because the punishment was just, and no greater crime might be found in the kingdom, or punished by parliament with more grace; than that of bringing a foreign force to conquer the realm. (175)

On December 1st the bill went through its earlier stages without diversion. (176) Fenwick was brought before the Lords on two specific occasions and questioned, but nothing was learned that might influence the Lords for mercy to him. By the 8th of December the issue was not

(173) 13 How. St. Tr., 726-728.

(174) Ibid. 749.

(175) Ibid, 750-753.

(176) Macaulay, Hist. of Eng., V. 163.

his guilt, but his importace and the precedent of the act. Then on the 15th the bill passed by a vote of 66 to 60. (177) The king did not give his assent to the act until the 11th of January 1697. (178)

The bill itself contains nothing new in the form or content of such acts. The charges are specifically set out:- the facts of his indictment at the session of Oyer and Terminer held in London May 28, 1696, for compassing and imagining the death of his majesty, and adhering to his enemies. Mention is made of Fenwick's false confessions reflecting on several peers. The facts of Goodman's withdrawal, and the impossibility of securing his evidence is set out. (180)

Sir John Fenwick, was beheaded on January 28th, 1697. The execution was accompanied with ceremonies given to a peer of the realm, "in compliment to the noble family with which he was connected." (181) Some reason for such an execution may be found in the Whigs attempted justification for the attainder of Fenwick, by adding to his importance even at his death.

Forty-two peers entered a protest and dissent in writing to the bill against Fenwick. Their reasons were forceful. They held that bills of attainder against persons

(177) Ibid, 163.

(178) 13 How. St. Tr. 755.

(180) The whole bill is given in 13 How. St. Tr., 547-548; 8 Wh. III c.4.

(181) Macaulay, Hist of Eng., V. 172.

who were tryable at law were dangerous, and might tend to the subversion of the laws of the kingdom; that the acts was contrary to the rules of law in that grand jurymen, and evidence in writing was not receivable at law, and the prisoner through no fault of his own was deprived of cross examination. Porter, as the only witness to the overt act, was conceived as a doubtful one, and Fenwick was considered so inconsiderable as not to endanger the peace of the realm, or to call for such an extraordinary act. (182)

never in England had such opposition to the method of proceeding by bill, arisen before. Whether we lay it to the party action of the Tories, to the hatred of the method, to the principles involved, or to combination of all of them,- the fact is there that the statesmen and the public all became cognizant to this parliamentary way of condemnation. And few dared to defend the proceedings except upon the ground of imminent public peril. We have noted that this was the last instance in England of a man being executed by attainder, and the influence of its example must have had much effect upon public opinion.

The next bill passed by parliament, after the attainder of Sir John Fenwick was directed against those members of the same assassination plot who had never been

(182) Dartmouth and Elliot Hodgkins (Hist, MSS.) MSS., Report XV. Part II, 336-337; The protest is also given in 13 How., St. Tr., 756, and the names of the signers follow the paper.



apprehended. The instrument enacted that if George Barclay kn't. \_\_\_\_\_ Johnson. alias Harrison, \_\_\_\_\_ Durant, alias Durance, Michael Hare, Major George Holmes, Philip Hanford, alias Browne, Richard Richardson, John Maxwell, \_\_\_\_\_ Bryerly, \_\_\_\_\_ Plowden, \_\_\_\_\_ Hungate, who were fled from justice, should not render themselves by March 25th 1697, to the chief justice of the King's realm, or to one of the secretaries of state, for trial for treason, they should stand as convicted and attainted of treason. (183) The purpose of the bill was to punish those who had fled to France and the continent, and who were not amenable to trial.

Ever since his expulsion from England James II had lived at the French Court, and plotted for the recovery of his crown. His son was only fourteen when James died, and Louis XIV in violation of the protocol of Syswick, 1697 formally proclaimed the lad King James III of England. (184)

Parliament in 1702 passed a bill of attainder against the pretended Prince of Wales, James III, for conspiracy against the crown, and for designing to dethrone the king. Any one corresponding with this pretended James III. was to be deemed guilty of high treason. (185).

(183) The act to attaint such persons concerned in the late horrible conspiracy to assassinate his majesty's royal person, who are fled from justice, unless they render themselves to justice, - 8 Will. III. c.4. See also 13 How. St. Tr., 547n.

(184) Macaulay, Hist of Eng., V. 409-413.

(185) 13 Will. III. c.3.

Since the king of France would aid the attempts of the new pretender, parliament probably thought that the plotting would become more virorous. Besides considerable excitement had been created by the act of a crew of drunken brawlers in London who had publicly proclaimed James III king of England. (186)

The treaty of Utrecht in 1713, did not grant England as honorable terms as might have been secured earlier in the war. Henry St. John, Viscount Bolingbroke and Secretary of State under Queen Ann, had carried on most of the secret negotiations for England with France between 1711 and 1713, so that when King George I. of Hanover came to the throne in 1714, the viscount found his position in England perilous. He had been deceitful and corrupt in his negotiations and in his conduct in office. He had corresponded with the Jacobidites in France with the purpose of overthrowing the Act of Settlement of 1701. (187)

When Parliament met in 1715, Bolingbroke had already fled to the continent. (March 26) James, duke of Ormond was also implicated in the peace negotiations with France, and he had been commander of the English forces in Holland. But Ormond decided to bluff or brave the affair out at home, (188).

(186) House of Lords (Hist. MSS) MSS. 1699-1702, Iv. 418.

(187) Lord Mahon, History of England, I. 14.

(188) Ibid. 122.

On April 9th, Stanhope layed before the House of Commons all the instructions, negotiations and other papers relating to thenegotiations for peace at Utrecht. On account of the large number of Manuscripts, the material was referred to a committee of thirteen composed mostly of Whigs, of which Robert Walpole was chairman. It took five hours to read their report. (June 9th, 1715 (189)

(189) Ibid, 125.

It declared that the peace of Utrecht was disgraceful, and condemned both Bolingbroke and Ormond for their part in the negotiations. It was loud in complaint against the betrayal of Catalane to Spain, of Tournay to France, and of the hopes held out to the pretender. On the twenty-first of June Stanhope moved the impeachment of James, Duke of Ormond, and the duke hastened to join Bolingbroke in France. (190)

Bills of attainder were then passed against both Bolingbroke and Ormond. The Viscount of Bolingbroke was accused of attempting to break the alliance of 1701 with Germany and Holland, and to make peace with France; to have disclosed the instructions of the plenipotentiaries to Utrecht; to have counseled his enemies and to have given (191) over a buffer town of the United Kingdom. Since he had been impeached and ordered to the bar, and had not answered, the Viscount was summarily ordered to render himself to justice before a certain day, or in default thereof be (192) attainted for high treason.

The Duke of Ormond was charged with aiding the French army while in charge of the general forces in Netherland; with treating with the French; giving them aid and comfort; and with refusing to act against them longer. His

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(190)- Lord Mahon, Hist. of Eng., I. 127; 15 How., St. Tr., 994 and 1057.

(191) 1 Geo. I. c. 16; See also 15 How., St. Tr., 994.

(192) Parl. Hist., VII. 137.

attainder was also made conditional. He should not receive the penalty if he should render himself to justice before a set time. Ormond's bill was read for the first time in the House of Commons on August 11; the second time on the 12th; the third on the 15th, and then was finally passed and the royal assent was given August 20, 1715, and (193) the bill was proclaimed as law.

There were a number of small conspiracies during the first two years of George I. reign, and those convicted in the royal courts, or the fugitives whom the law failed to apprehend were generally subjected to attainder for such treasonable plots. In 1714 a bill of attainder was passed by parliament to attaint John, Earl of March, William May, commonly called Marquis of Tullibardine, James, Earl of Linlithgow, and James Drummon, of high treason. (194) That same year the fugitives, - George, earl of Marishall, William, earl of Seathforth, James, earl of Panmuir, and James, earl of Southesque were all attainted unless they (195) rendered themselves for justice before a certain day. Thomas Forster, and William Mackintosh Esq. were both at- (196) tainted for treasonable conspiracy in 1715.

The dissent to a bill of pains and penalties passed against John Plunkett and three others for conspiracy in

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- (193) 1 Geo. I. c. 17; see also 15 How., St. Tr., 1057.
- (194) 1 Geo. I. c. 32.
- (195) 1 Geo. I. c. 42.
- (196) 1 Geo. I. c. 53.

1722 is of value to show the increasing sentiment against such acts. The king himself had acquainted the houses of the popish plot for the invasion of the pretender James III. The committee appointed by the Commons brought in a bill of pains and penalties against the four men. The bill passed the house by a vote of 280 to 91; and the Lords by 87 to 34. (197) This dissent was offered in the House of Lords.

It declared that bills of such a nature ought only to be passed in case of evident necessity, where the preservation of the state mainly requires it; that such proceeding though not in form are judicial in nature and proof; that these bills always weaken justice, and whenever passed have proved so many blemishes to the reign in which they were passed. (198)

A final attempt to restore the Stuart line in England was made in 1745 by Charles Edward Stuart, son of the pretender James III. Plans for the invasion were made as early as 1740 by seven prominent men of Scotland, who solemnly agreed to risk life and fortune for the cause of the Stuarts whenever a body of foreign troops should come to aid in the attempt. Extensive correspondence was carried on, and numerous agents crossed over from France to decide on the details of the plot. (199) The government was aware of

the threatened conspiracy against the established rule, for

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(197) Parl. Hist., VIII. 237; 16 How., St. Tr., 323. The king acquainted Parliament on the 11th of October 1722; For the bill of Pains and Penalties, see 9 Geo. I. c. 15.

A conditional act of attainder was passed against the Earl of Kellie, Viscount of Strathallan unless he rendered himself to an officer of justice for trial of the offense of high treason was passed in 1733. 19 Geo. II. 12. (198) Parl. Hist., VIII. 238 (199) Mahon, Hist. of Eng., III. 26&27

in 1744 an act of attainder was passed against the pretender's two sons to be in force in case they attempted to land in Britain.  
(200)

When 'Prince Charlie' did land in Scotland, he was well supported by the highland clans. Edinburgh was entered, and the king's troops in Scotland were defeated at Preston Pans. The Jacobite army then entered England bent on marching to London. They did not find the enthusiasm they expected, and they were compelled to retreat back across the border. The pretender's army was dispersed and routed by the royal troops at Culloden Moor, and Charles fled to the continent.  
(201)

This battle marked the last attempt of the Stuart line to regain the crown of England.

Parliament at its meeting in 1746 passed a bill of attainder against 43 Scottish rebels who were in hiding, these men had all been in arms against the established government, and were given until July 12, 1746 to surrender to the courts of law for trial; attainder was to fall upon all who had not surrendered by the time given.  
(202)

Dr. Archibald Cameron, an Edinburgh physician and a brother to the famous Lionel, although included in the act of attainder passed against the rebels, returned to Scotland in 1753 bent on raising funds for the exiled Jaco-

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(200) 17 Geo. II. c. 39.

(201) Mahon, Hist. of Eng., III. 208-242, 303-317.

(202) 19 Geo. II. c. 26.

bites on the continent. He was recognized and arrested. Since already attainted the courts had no other course but to pronounce the sentence of death for high treason, and he was executed on June 7, 1753 at Edinbrough. (203) This was the last execution under an act of attainder by the English parliament.

It must not be forgotten that England is not a nation of separated powers; that since at least the close of the Middle Ages the executive, the legislative, and the judicial functions of government have always been closely and inseparably bound together. We of this country must not confuse our own distinct departments, created separate under the clause of the constitution guaranteeing a Republican form of government, with the commingled system of England.

The history of bills of attainder is logically divided into three periods. Beginning with the earliest act of attainder in 1459 and extending to the opening of the reign of Henry VIII in 1509, bills of attainder were regularly passed against the rebellious parties striving for the control of the government. Each factional triumph between 1459 and 1509 was followed by such a legislative act, the purpose of which was outlawry, rather than the execution of the persons attainted. With few minor exceptions, all the individuals who were punished, were fugitives

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from the established government. The acts were political rather than judicial in character, and were dictated for the most part by the king.

The second period of bills of attainder covered the reign of Henry VIII (1509-1547). The uneasy and restless land over which he ruled, was experiencing a number of vital and far reaching movements and changes. The old worn out institutions and customs of the Middle Ages were giving place to the newer forms of modern times. The period was one of transition, that filled the people with uncertainty and misgiving. Henry controlled his parliaments through sympathy of the influential classes in his policies, and confidence in his ability, and in his efforts to establish a government of law and order. He resorted to attainder on numerous occasions. The innocent victims of such acts were always unpopular, while his religious attainders followed naturally from the establishment of the English church as a department of state. While more acts were passed during Henry VIII's reign than in any other, yet in a great number of cases, attainder was passed after conviction in the common law courts.

Since sovereignty rested in the king, or the king and parliament, the English in order to safeguard individuals from autocratic attainder, imputed to such acts more of the judicial than of the legislative element. Opinion still countenanced the bills, but scrutinized them from the legal rather than from the political viewpoint. Henry VIII even questioned

the legality of attainder when the victim was not brought to parliament before the act was passed.

The final period developed and crystalized first, a sentiment for formal legal proceedings in respect to evidence, hearings, charges covered by the statutes on high treason, and the importance of offense and offender; and second, opposition to any instrument which, curbed only by opinion, might be despotic and absolute. The bill of attainder against the Earl of Strafford was passed by authority of a supposedly common law treason, which was reiterated by parliament 'by authority of the salvo clause of the act of Edward III.' While his trial was a judicial farce, yet the accused appeared in parliament, answered to the charges, and produced evidence. Laud received like consideration. Even then the subversion of fundamental law was regarded with so great a suspicion that it was withheld from becoming a precedent to common law courts. Fenwick was allowed counsel, was permitted to answer the charges, to attend the hearings when testimony was given, and was granted the privilege of defense;- in short Fenwick received a trial, but to be sure not a fair one. And when the bill was passed, a virorous protest was entered against the act by a substantial minority because it was a 'precedent of proceedings contrary to the rule of the land.'

The agitation once started, soon passed beyond a mere cry for closer judicial proceedings, and became a demand for the total abandonment of this arbitrary method. So that

by the middle of the eighteenth century, attainder by parliamentary legislation fell into disuse, and is now obsolete.

It is impossible to give the exact number of persons attainted by order of parliament without access to sources which are not available to the present writer. At least 800 individuals were punished by legislative bill in England, nearly 250 of whom had already been convicted in common law courts before the act was introduced. But not half of this number were executed. Certain fundamental principles were established in the course of the history of these acts of attainder; Bills of attainder are unalterably opposed to the rules of common law. Since parliament was the supreme lawmaking body, it had the power to create new treasons or new offenses and punish by bill ex post facto; its acts of attainder could never be questioned by courts of law.